STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2007
v	No. 267338 Emmet Circuit Court
BRADFORD CARL ROSS, Defendant-Appellant.	LC No. 05-002399-FH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, as a lesser offense of first-degree premeditated murder, MCL 750.316(1)(a). Defendant was sentenced to 40 to 60 years' imprisonment. Defendant appeals as of right and we affirm.

The victim was defendant's roommate. After an altercation outside a bar during which defendant's nose was broken, the two men returned to their residence. During the walk home, the victim was allegedly yelling at defendant. The victim was killed inside the residence by defendant, who struck him repeatedly in the head and arms with a baseball bat. Defendant claimed at trial that the victim had been the aggressor, coming at defendant with the bat. Defendant claimed that after he disarmed the victim, he struck the victim once in the head. Defendant asserted that when the victim once again came at him, defendant struck him several more times. The victim died of his head wounds.

Defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that he did not act in self-defense or in the heat of passion based upon adequate provocation. We disagree. Defendant testified that he acted in self-defense because he believed that Harrington was trying to kill him. However, defendant indicated that this thought ran through his mind when the victim came at him the second time, after defendant had disarmed him. Moreover, defendant's allegation that the victim attacked him with a bat depended wholly on defendant's credibility. Considerations of credibility or weighing evidence are properly left to the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). The jury was free to discredit defendant's testimony that the victim attacked him with a bat or even that he believed that the victim was trying to kill him. See *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993) (holding that self-defense requires that the "defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm"). The jury also could have found that defendant used excessive force under the

circumstances because he was able to take the bat away from the intoxicated victim, whom the medical examiner opined had been struck in the head more than four times. The defense wounds on the victim's forearms (including a broken left forearm) also suggest that defendant continued to attack when the victim was no longer acting aggressively. See *id.* at 322-323 (holding that a defendant who uses more force than is necessary under the circumstances does not act in self-defense). Considering all the evidence in the light most favorable to the prosecutor, *People v Lange*, 251 Mich App 247, 250; 650 NW2d 691 (2002), the evidence supported the conclusion that defendant did not act in self-defense.

Alternatively, defendant argues the evidence was also insufficient to prove that he did not act in the heat of passion based on adequate provocation. The element of malice may be negated if "defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). If the fatal blows had been struck when defendant's nose was broken or when the victim allegedly charged at him carrying the bat, adequate provocation might arguably have been established. However, after having his nose broken, defendant walked home with the victim. Also, defendant successfully took the bat away from the victim without suffering any further injury.

Defendant argues that the period between the two attacks by the victim are part of a single ongoing transaction, providing no time for him to cool off. Although defendant attempts to link the two attacks, the jury was free to find that a reasonable person could have controlled his passions during this lapse of time. See, generally, *Lange, supra* at 252. While the victim's yelling could arguably have caused defendant to lose his control, he admitted that he was in control of himself while walking home and while placing phone calls after returning home. Defendant cannot rely on what a reasonable man might have done under similar circumstances when his testimony establishes that in reality he had not lost control.

As for the latter attack rekindling a passion provoked by the former attack, there is no evidence that defendant did lose control after having his nose broken. Rather, defendant testified that after the victim struck him, defendant explained to the victim that he was trying to help him home. When the victim responded by yelling at defendant, defendant just continued to walk home. Therefore, based on "the degree of force needed to cause the victim's injuries, the jury could have reasonably inferred that defendant acted with malice." *Id*. at 251.

Defendant next argues that he was denied due process of law and a fair trial because the authorities made no effort to find the starting point of the fight. Defendant asserts that no photographs of kitchen floor bloodstains were taken and no blood samples of these stains were collected. Defendant fails to provide a citation to the record showing where this issue was preserved. See *People v Milstead*, 250 Mich App 391, 404 n 8; 648 NW2d 648 (2002). Accordingly, we review this issue for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

"Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Further, the authorities cited by defendant do not support his argument that the police and the prosecutor have a duty to investigate on behalf of defendant. For example, although *Brady v Maryland*, 373 US 83, 87; 83

S Ct 1194; 10 L Ed 2d 215 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment," defendant has not explained what evidence plaintiff in fact possessed that defendant requested. Indeed, the gist of defendant's argument is that the authorities did not produce evidence that might have supported his version of events. *Brady* does not stand for the proposition that the authorities must produce such evidence.

Defendant also cites *Hurd v People*, 25 Mich 405, 415 (1872), in which our Supreme Court held that "the prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestae*, or whole transaction, if it appear [sic] that the evidence of the rest of the transaction is attainable." *People v Koonce*, 466 Mich 515, 518, 520; 648 NW2d 153 (2002) recognized, however, that the general *res gestae* rule from *Hurd* is no longer in effect. Defendant's reliance on *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970), is also misplaced. *Jordan* held that a handkerchief allegedly used to clean up the defendant's semen following a sexual assault should not have been admitted without testing indicating whether it contained semen. *Id.* at 385-389. However, this holding was not based on the conclusion that the prosecution has a duty to investigate for the defense. Rather, it was based on the conclusion that the prosecution, by failing to have the handkerchief tested, had failed to lay a proper foundation to introduce it. *Id*. at 389.

Defendant also argues that the police erred in investigating the crime scene using serological electrophoresis (SE) testing to check for the presence of human blood. Defendant asserts that under *People v Young* (*After Remand*), 425 Mich 470, 501-505; 391 NW2d 270 (1986), admission of this evidence constituted error requiring reversal because SE tests have not achieved general acceptance in the scientific community. Defendant does not make it clear how the alleged erroneous admission of scientific evidence supports the assertion that the authorities failed to investigate bloodstains in such a manner that could have supported his theories of self-defense or acting in the heat of passion. In any event, defendant misunderstands the scope of *Young*. *Young* held that a thin-gel multisystem (simultaneously analyzing three genetic markers) technique of serological electrophoric analysis of dried bloodstains (the "Wraxall thin-gel multisystem" test) had not attained the level of general acceptance in the scientific community necessary for admission of the results of such an analysis. *Young, supra* at 495, 501. However, in *People v Stoughton*, 185 Mich App 219, 228; 460 NW2d 591 (1990), this Court agreed with the trial court "'that the relevant scientific community has adopted the single system electrophoresis technique . . . as a valid, reliable method for determining genetic markers in dried blood.'" Because defendant cannot establish what type of electrophoresis technique was used, or, even if a Wraxall thin-gel test was used, that the test results were admitted into evidence, his argument fails.

Defendant next argues that plaintiff suppressed evidence when an officer took notes while interviewing defendant, wrote a police report based on those notes, and then failed to preserve them. None of the discernible authorities cited by defendant support his argument. For example, *California v Trombetta*, 467 US 479, 488; 104 S Ct 2528; 81 L Ed 2d 413 (1984), held that the failure to preserve breath samples from drivers did not render the breathalyzer data inadmissible because "[w]hatever duty the Constitution imposes on the States to preserve evidence" is limited to evidence that "possess[es] an exculpatory value that was apparent before the evidence was destroyed." *Id*. at 481-482, 488-489. Defendant fails to establish that the cited

notes would have provided exculpatory evidence. Defendant also argues that the notes were necessary because, without them, defendant can only rely on the officer's statement that he chose not to tape defendant's interrogation because he felt defendant would be more comfortable without a camera on him. However, defendant had no due process right under the United States Constitution[1] or the Michigan Constitution[2] to have his interrogation videotaped. *People v Geno*, 261 Mich App 624, 627-628; 683 NW2d 687 (2004).

Defendant next argues that certain police statements were inadmissible because he invoked his right to counsel during a police interrogation. Again, because defendant has not cited where he raised this issue below, we review for plain error. *Milstead, supra* at 404 n 8.

Defendant does not argue that he did not waive his *Miranda*[3] rights before the interrogation, and the record indicates that the officer involved read the *Miranda* rights to defendant, who indicated thereafter that he was willing to speak with the officer. An accused invoking his right to counsel after waiving his *Miranda* rights must do so unequivocally, and an ambiguous reference to counsel does not require police to stop an interrogation or to clarify whether the accused is invoking his right to counsel. *Davis v US*, 512 US 452, 459; 114 S Ct 2350, 2355; 129 L Ed 2d 362, 371 (1994); *People v Granderson*, 212 Mich App 673, 677; 538 NW2d 471 (1995).

Defendant's argument is predicated on the following testimony by the officer in issue:

> We spoke for probably another half-hour or so, and I asked him at one point in time if he was comfortable putting his statement down in writing and he told me no, he wanted a lawyer.
>
> He was always told, don't put anything into writing without seeking help first.

In *Connecticut v Barrett*, 479 US 523, 529; 107 S Ct 828; 93 L Ed 2d 920 (1987), the United States Supreme Court held that a statement that the accused wanted counsel before making a written statement did not prohibit the police from speaking with defendant and obtaining a verbal confession because defendant's request for counsel was limited to making a written statement. Thus, no error requiring reversal is established in the case at hand.

Defendant next argues that he was denied the effective assistance of counsel at a number of points during the lower court proceedings. We disagree with each assertion. Because

[1] US Const, Ams V and XIV.

[2] Const 1963, art 1, § 17.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant did not move for a *Ginther*[4] hearing, our review is limited to errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient by falling below an objective standard of professional reasonableness and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Defendant argues that he was denied the effective assistance of counsel because, although defense counsel argued that hiring a pathologist and a private investigator were crucial to the defense, and the trial court ruled that defense counsel could hire both, counsel hired neither. Defendant cites no record evidence to support his allegation that defense counsel did not hire a pathologist. Rather, he implies that because defense counsel did not present a pathologist as a defense witness at trial, he apparently never hired one. This is a non sequitur. There can be many reasons a witness is not presented at trial.[5] As for the issue of prejudice, defendant's claim of error presumes that another pathologist would have presented evidence favorable to defendant. Such a presumption is also unsupported by the existing record.

Similarly, there is also no record evidence that defense counsel did not hire a private investigator. Defendant implies that defense counsel did not hire an investigator because counsel did not put an investigator on the witness list. Again, this is a non sequitur. Moreover, defense counsel argued that he needed the investigator not as a witness but to interview people who knew defendant and the victim. Notably, the trial court stated that the investigator "would not be necessarily a witness." Defendant also apparently believes that because defense counsel did not present evidence of the victim's violent character beyond the month and a half before the killing, no investigation was ever conducted. This argument is also a non sequitur and presumes that other evidence of the victim's violent character existed. Such a presumption is not apparent on the existing record. Defendant's undocumented allegations to the contrary do not demonstrate an error that is apparent on the existing record. *Nantelle, supra* at 87.

Defendant next argues that defense counsel denied him the effective assistance of counsel when he failed to object to the following remarks made by the prosecutor during closing argument:

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[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] Notably, the trial court granted defendant's motion to hire a pathologist with limited funds to permit defense counsel to present the evidence to a pathologist and stated that if it appeared thereafter that the pathologist's testimony would be helpful, defendant could request additional funds for the pathologist's testimony.

> The other interesting thing about the whole scenario is guess who gets to tell what happened, the defendant . . . because [the victim] is not here to tell his side of the story.
>
> With that in mind, and based upon the wounds that [the victim] has on his body, who is to say that the victim . . . did not . . . pass out on the couch, and the defendant come in and beat him to death with a baseball bat.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Again, the victim's postmortem blood alcohol level was .23. An expert testified that blood was found "on basically all four walls around the couch." He also stated that the blood on the couch, including a pooling of blood beneath a cushion, and hair "found on the back rest of the couch" indicated that the altercation had taken place "in and around the couch on that one side of the couch." He also noted that police "did not find anything in the living room that was specifically broken." While defendant did testify that the victim was conscious and fighting with defendant when defendant struck him with the bat, the prosecutor's argument was still a reasonable inference based on the evidence. In any event, the trial court properly instructed the jury that the attorney's arguments were not evidence, and "jurors are presumed to follow their instructions[,]" *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that defense counsel denied him effective assistance of counsel by failing to move to dismiss the bindover for first-degree murder because there was insufficient evidence of premeditation. There can be no reasonable probability that requesting a dismissal would have made any difference, *Rodgers, supra* at 714, because the jury found defendant guilty of second-degree murder, rejecting the first-degree murder charge. In any event, the violence of the assault, including the presence of the defensive forearm wounds and multiple severe skull fractures, the pattern of the bloodstains, and the victim's blood alcohol level support a finding that defendant acted with premeditation, and thus sufficient probable cause existed for the bindover on first-degree murder.

Finally, defendant argues that the defense counsel should have requested a change of venue to another county because the incident occurred in a small community, the victim had family members on the local tribal counsel, a local Native-American Casino was the largest employer in the community, and local media reports of the incident were factually inaccurate. Given defendant's lack of record evidence to support his allegations, defendant "has not shown the existence of a strong community feeling against him or publicity so extensive and inflammatory that jurors generally could not remain impartial." *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). Thus, the lack of a request for change of venue is not an error that is apparent from the existing record. *Nantelle, supra* at 87.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter